

16/83

No.31 of 1980

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N:

KANDASAMI S/O KALIAPPA GOUNDER Appellant
(Plaintiff)

- AND -

10 MOHD MUSTAFA S/O SEENI MOHD Respondent
(Defendant)

CASE FOR THE RESPONDENT

RECORD

1. In this Case the following definitions are used:

"the defendant" means the respondent in this appeal who is the defendant in this action and was the appellant before the Federal Court of Malaysia

20 "the Plaintiff" means the appellant in this appeal who is the plaintiff in this action and was the respondent before the Federal Court

"the property" means 43 Penang Street, Penang

"the ground floor" means the whole of the ground floor of the property

30 "the July agreement" means a written document (described as a lease but not executed under seal) dated the 30th day of July 1970 and made between the defendant of the one part and the plaintiff of the other part. p.89, p.94

2. This is an appeal by the plaintiff from a judgment dated the 2nd February 1979 of the p.67

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- p.48 Federal Court of Malaysia (Appellate Jurisdiction) (Raja Azlan Shah, Chang Min Tat and Syed Othman F.JJ), allowing an appeal from a judgment dated the 30th June 1978 of Gunn Chit Tuan J. whereby (inter alia) it had been:
- p.63 (1) declared that the plaintiff was tenant of the ground floor and entitled to protection of the Control of Rent Act 1966;
- p.63 (2) ordered that the defendant return to the plaintiff certain books of account; 10
- p.63 (3) ordered by consent that the plaintiff pay to the defendant the sum of \$8,500 being mesne profits calculated up to the 31st day of March 1978 without prejudice to the plaintiff's right to claim from the defendant's superior landlords certain arrears of assessment; and
- p.63 (4) ordered that the defendant pay the plaintiff 75 per cent of the costs of the action to be taxed. 20
- p.79 3. The Federal Court on allowing the defendant's appeal ordered (inter alia) that:
- (1) the plaintiff deliver vacant possession of the ground floor and the eating shop and restaurant business known as "Nava India Restaurant" at the property within two months from the date of the order;
- p.79 (2) the plaintiff pay to the defendant the sum of \$8,500 on the terms of the consent order mentioned in paragraph 2(3) above; 30
- p.80 (3) the plaintiff pay to the defendant further mesne profits at the rate of \$300 per month from the 1st June 1978 until delivery of possession;
- p.80 (4) the defendant's costs of the appeal to the Federal Court and in the court below be taxed and paid by the plaintiff.
- p.82 4. This appeal is made pursuant to an order of the Federal Court dated the 9th July 1979 granting final leave to the plaintiff to appeal to His Majesty the Yang Di-Pertuan Agong. 40
5. The issue in this appeal is whether the plaintiff holds and has held since 1970 a tenancy

10 or merely a licence of the ground floor from the defendant. There were other issues raised on the pleadings but resolved by agreement by the time the case came before the learned judge. The only issues for decision by the learned judge were the question of licence or tenancy and the question whether there should be an order for the return of the books of account mentioned in paragraph 2(2) above. The question of books of account was no longer a live issue by the time the Federal Court delivered its judgment and does not arise in this appeal.

p.50,
11.12-16

6. This action was begun by writ issued on the 11th September 1971. The statement of claim was delivered on the 24th November 1971. The re-amended defence and counterclaim were delivered on the 18th January 1977 and the re-amended reply and defence to counterclaim was delivered on the 8th February 1977.

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p.14

20 7. The action came on for trial before the learned judge on the 24th March 1977 and was heard on that day and on eight subsequent days between then and the 7th September 1977. Evidence for the plaintiff was given by the plaintiff himself (PW1) and five other witnesses. Evidence for the defendant was given by the defendant himself (DW1) and five other witnesses.

pp.19-34
pp.34-47

30 8. The plaintiff's own evidence was summarised by the learned judge in his Grounds of Judgment as follows:

p.50 1.17-
p.51 1.37

- 40 (1) Some time in March 1970 when the plaintiff was looking for premises for an eating shop a man called Koori introduced the plaintiff to the defendant.
- (2) After some negotiations the defendant agreed to rent out the ground floor to him for \$230 per month.
- (3) The duration of the tenancy was not discussed but the plaintiff was asked to pay two months' rent as deposit, i.e. \$460, and told that he could remain there as long as he paid the rent.
- (4) The rental of \$230 per month was to include light, water, the use of furniture and fittings on the said premises, the use of the defendant's eating shop licence and of the defendant's business name Nava India Restaurant.

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(5) On that day (in March 1970) the plaintiff paid the defendant \$230 and paid the balance of the deposit of \$230 on the 15th March 1970.

(6) The defendant wanted the July agreement to be drawn up because he needed protection under the rent control law as he was collecting excessive rent. The defendant also told him that he would get into trouble with the income tax authorities if someone reported him to them. The July agreement had been signed for the benefit of the defendant who had told him that he need not worry about it and that it was not intended to be binding on the plaintiff.

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p.52 1.1
p.52 1.27

9. The defendant's own evidence-in-chief was summarised by the learned judge in his Grounds of Judgment. The learned judge's summary of the defendant's evidence included the following points:

(1) The defendant became tenant of the property in March 1973 and paid a monthly rental of \$174.

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(2) Prior to March 1973 the defendant's father Seeni Mohammed had been the tenant and carried on business there under the name of Nava India Restaurant.

(3) The defendant's father had assigned the business to defendant by a deed of assignment dated the 27th July 1967.

(4) After the said assignment the business was registered in the defendant's own name and he carried on business there until July 1970 when he leased it to the plaintiff for one year.

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(5) The plaintiff had come to join the defendant as a cook in April 1970.

(6) In June 1970 the plaintiff, the defendant, one Koori and one Hyduruce (DW6) went to see the defendant's father but the defendant's father was not in favour of the defendant's leasing out the business.

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(7) The same four people went to see the defendant's father again in July 1970 and it was agreed that the plaintiff should pay the defendant \$230 per month for the licence of the business and \$70 for water and light.

(8) The four of them then went to a solicitor and the plaintiff and the defendant signed the written agreement dated the 30th July 1970 which was exhibit D12. RECORD
p.89

(9) \$460 was paid to the defendant by Hyduruce below the lawyers' office in the presence of the plaintiff

(10) The defendant denied that the plaintiff had taken over the business on the 1st April 1970.

10 10. The learned Judge then considered the cross-examination of the defendant and concluded that the defendant was a most untruthful witness. p.52 l.28-
p.54 l.18

11. The learned Judge made two basic findings of fact: p.55 11.11-25

20 (1) In the month of March 1970 there was an oral agreement between the plaintiff and the defendant whereby the plaintiff was allowed to enter and occupy the ground floor for an indefinite period after paying the defendant a deposit of \$460 being two months' rental of \$230 per month, which was agreed to include light, water, use of furniture and fittings and the use of the defendant's eating shop licence and business name.

30 (2) On or about 30th July 1970 the defendant managed to induce the plaintiff, an illiterate person, to sign the July agreement, which did not contain all the terms the parties had negotiated previously and agreed upon and was not intended to be binding upon them.

The first of these findings was not challenged by the defendant at the hearing before the Federal Court and is accepted for the purpose of the present appeal also. But the second finding is challenged. p.71 11.19-22

12. The two questions which arise in this appeal are:-

(1) On its true construction did the July agreement create a tenancy or a licence?

40 (2) Did the evidence prove and entitle the judge to hold that the July agreement, on its proper construction, did not truly represent or reproduce the real transaction between the parties?

This approach to the case is in accordance with

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authority: see particularly per Stephenson L.J. in O'Malley v Seymour (1979) 250 E.G. 1083 at page 1083.

13. The main propositions of law which the defendant contends are relevant in this appeal are as follows:

- (1) In considering whether the relationship between the two parties is one of licence or tenancy, the decisive consideration is the intention of the parties: 27 Halsbury's Laws of England, 4th edition, paragraph 6. 10
- (2) The court should approach the question without any bias in favour of a tenancy or licence: O'Malley v Seymour (1979) 250 E.G. 1083: Aldrington Garages v Fielder (1978) 247 E.G. 557.
- (3) The intention of the parties to a written agreement is to be gathered only from the terms of the document construed as a whole in the light of such evidence of surrounding circumstances as is admissible. 20
- (4) The court can only go behind the construction of the document if satisfied that it does not represent the real transaction between the parties: O'Malley v Seymour (supra).
- (5) When the agreement expresses the purpose of intention of the parties that is prima facie evidence of the true purpose or intention which can only be displaced by evidence that the expressed purpose or intention does not represent the true intention. The burden lies on the party seeking to displace the expressed purpose or intention: Buchmann v May (1978) 2 All E.R.999. and the following principle may possibly be relevant: 30
- (6) If on its true construction the document creates a licence, it is immaterial that it may have been designed to avoid statutory rent control: Aldrington Garages v Fielder (supra); Shell-Mex and B.P. Ltd. v Manchester Garages Ltd. (1971) 1 WLR 612. (The Defendant contends that on the Federal Court's findings, which were correct, this principle does not in fact have any application to the case). 40

The first question: On its true construction did the July agreement create a tenancy or a licence?

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14. The learned judge, because of his conclusion that the July agreement had not been intended to bind the parties, did not find it necessary to consider in detail the terms of that document. He did nevertheless give some brief consideration to its terms and expressed the view that the majority of the clauses in the agreement were covenants such as those for quiet enjoyment and re-entry which were normally found in standard tenancy agreements. p.60 11.34-43
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15. The learned judge's conclusion that the true relationship between the parties as revealed by their conduct and the surrounding circumstances was that of landlord and tenant and not licensor and licensee was apparently his overall conclusion based not merely on consideration of the first question but also taking into account (as the primary reason for his conclusion) his finding on the second question. p.61 11.27-29
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16. The Federal Court, because it did not endorse the judge's conclusion on the second question, did find it necessary to consider the July agreement in greater detail than had the learned judge. The Federal Court did not overlook those parts of the agreement which pointed towards a tenancy but it concluded that the agreement contained a number of matters which pointed towards a licence, in particular the following: p.78 1.10
- (1) The second recital.
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- (2) Clause 2(d) and 2(i), which the Federal Court (whose knowledge and experience of such matters in Malaysia is an important factor to be taken into account) regarded as more commonly found in a licence of a business: cf. Chin See Lian v Ng Wan Pit (1973) 1 M.L.J.115. p.73 1.48 to p.74 1.3
- (3) Clause 3(d).
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- (4) Clause 5, which was correctly understood and analysed by the Federal Court and given the appropriate weight. p.74, 11.26-41 p.77 11.2-27
17. The Federal Court concluded that in its judgment it was reasonably clear that what was given in the document was a licence. Its view of the habendum (or perhaps strictly the demise) i.e. that it was an error of drafting, was a correct view since on looking at the document as a whole a licence rather than a tenancy was intended by the parties. p.77 11.5-7 p.73 11.34-43 p.77 11.26-27

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The second question: Did the evidence prove and entitle the learned judge to hold that the July agreement, on its proper construction, did not truly represent or produce the real transaction between the parties?

18. The learned judge came to the following conclusions about the signing of the July agreement:

p.55 11.20-22 (1) The defendant had managed to induce the plaintiff, an illiterate person, to sign the written agreement in that form. 10

p.55 11.22-25 (2) The written agreement did not contain all the terms which the parties had negotiated previously and agreed upon and had not been intended to be binding upon them.

19. The defendant contends that it is not material whether the written agreement contained all the terms of the earlier arrangements between the parties. If the agreement was intended to be binding then in the absence of any claim for rectification it must be taken to have superseded any previous arrangement. 20

p.25 11.18-29 20. The notes of the plaintiff's own evidence about the signing of the July agreement are at page 25, lines 18 to 29 of the record. The Federal Court demonstrated how insubstantial and unfounded were the plaintiff's alleged reasons for the defendant having required him to enter into the July agreement. Moreover, the Federal Court drew attention to the fact, which the learned Judge had not mentioned in his Grounds of Judgment, that the plaintiff had himself relied on the written agreement in his statement of claim. The Federal Court also said that there was not the slightest suggestion for the probability which occurred to the learned judge's mind of an attempt to evade the tentacles of the Control of Rent Act 1966. 30

21. The weakness of the reasons given by the plaintiff for the defendant having required the signing of the July agreement, as those weaknesses were exposed by the Federal Court's analysis, demonstrate that the learned judge ought not to have accepted the plaintiff's evidence in the uncritical manner in which he did. While the defendant cannot challenge the judge's view of the defendant's own truthfulness as a witness, the Federal Court was nevertheless correct in concluding that the evidence on the plaintiff's side did not justify going behind the written agreement. 40

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22. The defendant, as respondent in this appeal, respectfully submits that this appeal should be dismissed with costs and the decision of the Federal Court of Malaysia affirmed for the following (among other):

R E A S O N S

- 10 (1) BECAUSE the learned judge was wrong in his conclusion that the written agreement dated the 30th July 1970 had not been intended to be binding upon the parties.
- (2) BECAUSE the learned judge ought to have upheld the said agreement as an agreement binding upon the parties.
- (3) BECAUSE on its true construction the said agreement conferred on the plaintiff merely a licence (and not a tenancy) of the ground floor of the premises at 43 Penang Street, Penang.
- 20 (4) BECAUSE the defendant's appeal was rightly allowed by the Federal Court.

GERALD GODFREY

NICHOLAS STEWART

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B E T W E E N :

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CASE FOR THE RESPONDENT

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